

APR 17 1992

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

CITY OF BURLINGTON

Petitioner,

vs.

ERNEST DAGUE, SR., ERNEST DAGUE, JR.,  
BETTY DAGUE, AND ROSE A. BESSETTE

Respondents.

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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## ARGUMENT

Respondent and their amici contend that the district court, in awarding reasonable attorney's fees, should be free to substitute its judgment as to what a market rate theoretically should be for what the evidence shows the actual market rate to be. It was precisely this sort of arbitrary result which led this Court to reject the approach theretofore adopted by the Third Circuit and to endorse the particular lodestar method of fee calculation set forth in Hansley v. Eckerhart, 461 U. S. 424 (1933); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 561-566 (1986). The same rationale should lead the Court to reject Respondents' argument today.

- A. The lodestar hourly rate is determined by evidence of how the relevant market actually compensates for similar services.

The Hansley lodestar method requires that the lodestar hourly rate be determined from evidence as to rate at which attorneys of similar skill, experience and reputation are actually compensated in the relevant market. Blum v. Stenson, 465 U.S. 886, 888-895 (1984) (text and footnote 11 thereto). The actual rate of market compensation is not determined by reference to what Respondents' counsel hopes to obtain by way of a fee award or by reference to economic theory. Neither is it determined by parsing out its the various components of the market value and assigning value to them. It is determined instead by hard evidence of what the market actually pays on an hourly basis for those services.

There is simply no need for a court to delve into the particular components that together make the total of the lodestar hourly rate. What the court needs to know for the purpose of setting fees is the market hourly rate. Its purpose is served by evidence indicating that rate. It is the market itself that decides the importance which is attributed to particular components of the total, not the courts. Therefore, the extent, if any, to which the market rate reflects risk of loss contingency is not of any import in setting reasonable attorney's fees. If the market compensates for risk of loss contingency, determination of the market rate subsumes and incorporates that factor. If the relevant market does not recognize and compensate for risk of loss contingency the market rate will not and should not reflect that factor. When a lodestar award of fees is made based upon the objectively determined reasonable hourly rate, therefore, the award will reflect risk of loss compensation exactly to the extent the relevant legal market recognizes and provides compensation for such risk assumption to attorneys practicing in that market. It is the market, not the court, in other words, that determines what is reflected in the reasonable hourly rate.

- B. Enhancement of the lodestar rate to reflect risk of loss contingency should not be allowed.

Any effort to increase a lodestar award by use of a contingency factor or multiplier necessarily takes a court out of its role as an objective factfinder and forces it to formulate subjective policy decisions - a legislative, not a judicial function. It is simply impossible for this Court or any other

court to objectively determine what multiplier to apply to a lodestar fee to reflect compensation for assuming a contingent risk of loss without making those policy decisions. Any such decision by a district court to enhance a lodestar fee represents a windfall. If the market recognizes and compensates for risk contingency, then the enhancement duplicates compensation already reflected in the lodestar rate. If the market does not recognize and compensate for risk contingency, then the enhancement represents compensation that is not available in the relevant market. Whether a prevailing party should receive such additional compensation or any compensation for risk of loss contingency beyond what the market provides are complex and politically based. Any such decisions should be made by Congress, not the courts. Policy considerations of that nature should be left for congressional determination.

Respectfully submitted,  
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April 17, 1992